

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH AFFIDAVIT
OF MAILING

76-1320

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1320

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

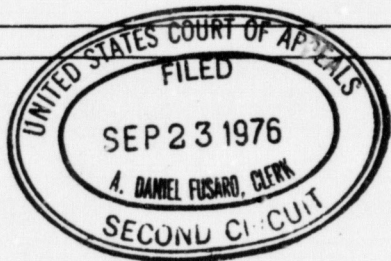
-against-

JUAN MacDOUGAL-PENA and
KINGSLEY ROTARDIER,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT
KINGSLEY ROTARDIER



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TABLE OF CONTENTS

	<u>PAGE</u>
Preliminary Statement	1
Statement of Issues	2
Statement of Facts.	2
Argument:	
Point I - The evidence never showed that an overt act was committed which was in furtherance of the con- spiracy and which placed venue in the Southern District of New York. . . .	5
Point II- There was no evidence to show that the "con- spiracy" involved more than one person	8
Conclusion.	9

TABLE OF CASES

<u>Bollenbach v. United States</u> , 326 U.S. 607 (1946)	6
<u>Feder v. United States</u> , 257 Fed. 694 (2d Cir. 1919)	8
<u>Herman v. United States</u> , 289 F.2d 362 (5th Cir. 1961).	8
<u>Hyde v. United States</u> , 225 U.S. 347 (1911). . .	7
<u>Lonabaugh v. United States</u> 179 Fed. 476 (8th Cir. 1910)	7
<u>United States v. DeKunchak</u> , 467 F.2d 432 (2d Cir. 1972).	6
<u>United States v. Ehr Gott</u> , 182 Fed. 267 (2d Cir. 1910).	7
<u>United States v. Fox</u> , 130 F.2d 56 (3rd Cir.), cert. denied, 317 U.S. 666 (1942)	8

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 76-1320

JUAN MacDOUGAL-PENA and
KINGSLEY ROTARDIER,

Defendant-Appellants.

-----X

BRIEF FOR DEFENDANT-APPELLANT
KINGSLEY ROTARDIER

PRELIMINARY STATEMENT

Appellant Kingsley Rotardier appeals from a judgment of the United States District Court for the Southern District of New York (Bonsal, J.) entered June 30, 1976, convicting appellant on each of three counts charging him, along with his co-defendant Juan MacDougal-Pena, of (1) conspiracy to transport stolen goods in foreign commerce (18 U.S.C. §371); (2) the transportation in foreign commerce of various stolen stock certificates (18 U.S.C. §2314); and (3) the transportation of stolen silver coins in foreign commerce (18 U.S.C. §2314). Appellant was sentenced to three concurrent prison terms of three years each. He is presently incarcerated.

STATEMENT OF ISSUES

1. Was the evidence sufficient to convict appellant Rotardier of the conspiracy count where no overt act was shown to have been committed during the pendency of the conspiracy which would have placed venue in the Southern District of New York?

2. Was the evidence sufficient to show that co-appellant Pena conspired with appellant Rotardier in order, thereby, to create the requisite plurality charged in the conspiracy count?

STATEMENT OF FACTS

Sometime around July 11, 1974, appellant Rotardier, accompanied by Harvey Bernstein, Martin Lewis and a third man who was never introduced but who the government maintained was the co-defendant Pena, met with Arthur Sherman, the branch manager of Hayden, Stone, the brokerage house,^{1/} at the 505 Park Avenue Branch (39-41).^{2/} Appellant Rotardier falsely introduced himself as Steven Hyde-Swift and Sherman was told by Bernstein that he and Rotardier wanted to open a joint account with the brokerage, depositing securities as collateral (42).^{3/} In that connection, several form-type documents were filled out or signed by either Bernstein or Rotardier in the name of Steven Hyde-Swift (44-49). Also, Rotardier gave to

^{1/} Hayden, Stone has since acquired Shearson, Hammill. The successor firm is Shearson, Hayden, Stone.

^{2/} Page references in parenthesis are to pages of the trial transcript.

^{3/} Rotardier and Bernstein were told that if either died, the other would become sole owner of the account (71).

Sherman a batch of stock certificates that he had with him in a suitcase, some of which were in the name of Steven Hyde-Swift. They were valued at \$36,337.50 (50-52; Gov't Exhs. 7-20). In addition, Rotardier showed Sherman securities in the name of The Arthur M. Hyde Foundation and in the name of Caroline Hyde-Swift (52-53). Sherman, however, refused to take these securities because they were not in the name of Steven Hyde-Swift (53).

Within a few days of this first meeting, Rotardier showed to Sherman a New Jersey driver's license in the name of Mr. Swift (Gov't Exh. 21; 54-55, 60). He also told Sherman that he had an account at the Puerto Rico branch of Bache & Company which, upon investigation by Sherman, turned out to be an account in the name of Mrs. Swift (56-58).^{4/} Sherman also inquired of the Bache office whether they had an account for Steven Swift "and they said no, but they had an account for his mother and I said, well, Mr. Swift was selling some securities here, can you verify it, and he said, that's peculiar because Mr. Swift is in college -- in Utah and I asked him to describe Mr. Swift and he told me he is about 19 years old, Caucasian and long blond hair" (58-59).^{5/}

The government attempted, also, to show that sometime in mid-July, appellant Rotardier sold more than \$23,000 worth

^{4/} This testimony and what followed, which was hearsay, was objected to by counsel for Pena (58). Earlier, however, the attorneys (with the Court's concurrence) had stated that objection by one would be the objection of the other unless there was an express disassociation (12).

^{5/} Rotardier is Black and about 35 years old.

of silver coins to a New York City coin dealer. The dealer, though he identified a check written to the order of "Kingsley Rotardier" in the amount of \$23,719.20 (Gov't Exh. 23; 87-89), was unable to identify appellant Rotardier in the Courtroom (89).^{6/}

The Government also sought to show that appellant Rotardier cashed the check which had been made out by the coin dealer. Accordingly, an employee of the Chase Manhattan Bank testified that Government Exh. 23 was cashed at the bank by someone who produced identification of "Kingsley Rotardier" (91-93). The witness, however, was unable to identify appellant Rotardier as the person who presented the check for payment (94).

Caroline Swift testified that she owned two residences on the Island of St. Croix in the Virgin Islands, one known as "Hill Villa" and the other as the "Chalet" (115, 129). Mrs. Swift related that the appellant Rotardier, using the name "Div Reveault", and the co-defendant, Pena, who used the name "Dominic"^{7/} had rented the ground floor of Hill Villa in April (116-118). In 1974, at Hill Villa, she had kept locked in a fireproof filing cabinet the stocks which turned up in July, 1974, in the offices of Hayden, Stone (125-127, 139). She also had kept locked in the filing cabinet a large quantity of silver coins (123, 139-140). The keys to the cabinet, of which there were two copies, were kept by Mrs. Swift in a secret place known only to her and her trusted helper Mrs. Viola Westerman. Mrs. Swift also had a large quantity of silver coins which she

^{6/}The Court reserved decision on the defense motion to strike the dealer's testimony (91). The motion was subsequently denied (211).

^{7/}Mrs. Swift was uncertain of "Dominic's" last name (117).

kept in a safe at the Chalet. She also kept in the safe a collection of about 35 antique paper weights (131-132).^{8/}

Mrs. Swift left St. Croix in early May for a vacation in the United States. Over objections, Mrs. Swift testified that she received a telephone call on July 10 from Mrs. Westerman and was told that the top of the safe at the Chalet had been drilled out and the contents removed (133-134).^{9/} A second call that day from Mrs. Westerman was the occasion to advise Mrs. Swift that the filing cabinet had been "tampered with" (136) but that she was unable to determine if anything had been taken. Mrs. Swift eventually learned, on July 16, that the cabinet had been opened and that "everything was gone" (138). She returned to St. Croix on August 6 (152).

Neither defendant testified and both defendants rested without calling any witnesses.

ARGUMENT

Point I

THE EVIDENCE NEVER SHOWED THAT AN
OVERT ACT WAS COMMITTED WHICH WAS
IN FURTHERANCE OF THE CONSPIRACY
AND WHICH PLACED VENUE IN THE
SOUTHERN DISTRICT OF NEW YORK

Count One of the indictment charges a conspiracy between the appellants to violate 18 U.S.C. §2314 - the nub of which is the transportation of stolen goods in foreign or

^{8/} The key to this safe was kept in a secret location known (presumably) only to Mrs. Swift and Mrs. Westerman (148).

^{9/} Later in the trial, Mrs. Westerman testified herself to these events (170). She added that she had seen "Div Reveault" on July 10 and "Dominic" was with him (175).

interstate commerce - and that part of the agreement was to acquire by theft those things which were to be transported. In a word, it charges an agreement to steal and transport. It charges nothing more. Thus, in particular, the two charging paragraphs which comprise the body of the count do not allege that the defendants also agreed to violate 18 U.S.C. §2315, a companion section which makes it a crime to "sell or dispose" of such stolen goods, an allegation which, had the government so chosen, could have been included in this eleventh hour charge added to the indictment.^{10/}

Despite the fact that the body of the conspiracy charge made no allusion to the crimes enumerated in Section 2315, two of the overt acts alleged covered conduct which, as the proof at trial developed, could not have been committed "in furtherance" of the conspiracy charged. Specifically, overt acts 3 and 4, which alleged, respectively, delivery of the stolen securities on July 11 and delivery of the coins on July 16, necessarily had to occur (and the proofs so showed) after the object of the conspiracy had been completed.^{11/} As

^{10/} Count One was an afterthought. The original indictment included only what are now Counts Two and Three. About an hour before the trial began, however, Judge Bonsal received a copy of a superseding indictment which added a conspiracy count (2-3).

^{11/} Even apart from the language in the indictment, an offense under Section 2314 is completed once the stolen goods have been transported. See Bollenbach v. United States, 326 U.S. 607, 610 (1946). Once the transportation of the securities and coins was completed, the defendants' actions would have had to embrace the conduct set forth in Section 2315. (It is not uncommon, we note, to charge a defendant with substantive violations of Section 2314 and 2315 even though the facts show one continuous course of conduct. See, e.g., United States v. DeKunchak, 467 F.2d 432 (2d Cir. 1972)) As previously noted, however, the conspiracy charged in Count One embraced Section 2314 alone.

such, proof of those so-called "overt acts" could not legally support the conspiracy charged. See United States v. Ehr Gott, 182 Fed. 267 (2d Cir. 1910); Lonabaugh v. United States, 179 Fed. 476 (8th Cir. 1910).

Moreover, overt acts 3 and 4 were not merely surplusage for proof of their commission was necessary (had they been otherwise properly included) to establish venue for the conspiracy charge in the Southern District of New York. See Hyde v. United States, 225 U.S. 347, 356-367 (1911). Thus, overt act 1, which alludes to the theft in St. Croix was obviously not committed in the Southern District. Similarly, overt act 2, which alleged that the defendant "flew from the Islands of St. Croix... to New York, New York" could not have been committed in the Southern District as well as the Eastern District of New York. In all events, there was no proof at trial to show that they arrived by plane in the Southern District and it is clearly unlikely that they did give the location of JFK and LaGuardia Airports in the Eastern District.

Upon all of this, we believe that the evidence was wholly insufficient to support the conspiracy charged. In summary, it was deficient because, as framed by the indictment, the only way in which venue for the conspiracy could be shown would be by proof of overt acts which, because they were committed after the object of the conspiracy had been attained, were a nullity as to the conspiracy charge.

Point II

THERE WAS NO EVIDENCE TO SHOW
THAT THE "CONSPIRACY" INVOLVED
MORE THAN ONE PERSON

Appellant Pena has forcefully argued in Point I of his brief that there was no evidence to connect him with the crimes charged, including the conspiracy. Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure appellant Rotardier adopts that argument the correctness of which also requires that the conspiracy conviction against appellant Rotardier must also be set aside there being no evidence to show the requisite plurality to the conspiracy. See Feder v. United States, 257 Fed. 694, 696-697 (2d Cir. 1919); Herman v. United States, 289 F.2d 362, 368 (5th Cir. 1961); United States v. Fox, 130 F.2d 56, 57 (3rd Cir.), cert. denied, 317 U.S. 666 (1942). Plainly, there was insufficient evidence in the case to show that others "known and unknown" were sufficiently connected with appellant Rotardier to supply the necessary co-conspirator.

CONCLUSION

The judgment of conviction on Count One should
be reversed.

Dated: September 22, 1976
New York, New York

Respectfully submitted,

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PROOF OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Laura Roger , being duly sworn deposes
and says:

1. I am over 18 years of age and am not a party to this action.

2. On September 22 1976, I served the foregoing Brief for the Appellant Kingsley Rotardier upon Robert Fiske, United States Attorney for the Southern District of New York

by depositing ^{two} ~~at~~ true ^{copies} ~~copy~~ ~~ies~~ thereof in an official depository under the exclusive care and custody of the United States Postal Service located at 35 Broadway, New York, New York, each enclosed in a postpaid wrapper, which wrapper~~s~~ [was] addressed as follows:

Honorable Robert Fiske
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Laura Roger

Sworn to before me this

22nd day of September 1976.

Irene Mansoura Cohen
Notary Public

IRENE MANSOURA
NOTARY PUBLIC, State of New York
No. 24-4507262
Qualified in Kings County
Commission Expires March 20, 1977